



## Santa Clara Law Review

Volume 21 | Number 4

Article 5

1-1-1981

# Make-Whole Relief under the California Agricultural Labor Relations Act: The Ex-Cell-O Doctrine Revisited

Mary Lynne Thaxter

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](http://digitalcommons.law.scu.edu/lawreview)

### Recommended Citation

Mary Lynne Thaxter, Comment, *Make-Whole Relief under the California Agricultural Labor Relations Act: The Ex-Cell-O Doctrine Revisited*, 21 SANTA CLARA L. REV. 1069 (1981).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol21/iss4/5>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## COMMENTS

### MAKE-WHOLE RELIEF UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT: THE EX-CELL-O DOCTRINE REVISITED

#### I. INTRODUCTION

The Agricultural Labor Relations Act (ALRA or Act) was enacted in California in 1975 in an attempt "to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations and to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state."<sup>1</sup> The ALRA was modeled in large part after the National Labor Relations Act (NLRA)<sup>2</sup> of 1935, which specifically excluded agriculture from its coverage. Among the most important organizational provisions of the ALRA is section 1148, which declares that the Agricultural Labor Relations Board (ALRB or Board)<sup>3</sup> "shall follow applicable precedents of the National Labor Relations Act, as amended."<sup>4</sup> Other substantive provisions within the ALRA were designed both to accommodate the special needs of the agricultural industry and to strengthen provisions in the NLRA which would have been deficient if applied to agriculture.<sup>5</sup> One such divergence from the NLRA is the express grant of statutory authority given to the Board to order a monetary remedy when an employer engages in the unfair labor practice of refusing to bargain in good faith. This remedy

---

© 1981 by Mary Lynne Thaxter

1. California Agricultural Labor Relations Act of 1975, § 1, CAL. LAB. CODE §§ 1140-1166 (West Supp. 1981).

2. National Labor Relations Act (1935), *as amended* by 29 U.S.C. §§ 151-168 (1976).

3. CAL. LAB. CODE § 1141(a) (West Supp. 1981) provides that: "there is hereby created in state government the Agricultural Labor Relations Board . . . ."

4. CAL. LAB. CODE § 1148 (West Supp. 1980).

5. Levy, *The Agricultural Labor Relations Act of 1975 - La Esperanza De California Para El Futuro*, 15 SANTA CLARA LAWYER 783 (1975).

is referred to as "make-whole" relief.<sup>6</sup> The NLRA contains no express statutory provision for make-whole relief, and the NLRB, for this reason as well as others,<sup>7</sup> has consistently refused to grant such an award.<sup>8</sup>

A make-whole order is designed to grant a monetary award to employees in compensation for losses incurred as a result of an employer's unlawful refusal to bargain immediately upon the union's demand. The amount of the award reflects the "increased benefits" the employees would have gained had the employer bargained.<sup>9</sup>

The ALRB originally held that make-whole relief is appropriate in *any* refusal to bargain case, including the situation where an employer commits a "technical" refusal to bargain<sup>10</sup> for the purpose of obtaining judicial review of a representation election. The California Supreme Court recently reversed the Board's position,<sup>11</sup> however, and held that the Board lacks authority to impose make-whole relief in a categorical fashion when an employer is found guilty of an unfair labor practice solely as a result of a technical refusal to bargain.<sup>12</sup> The court instead instructed the Board that make-whole relief is "appropriate" only when an employer commits

---

6. CAL. LAB. CODE § 1160.3 (West Supp. 1981) provides in part: "If . . . the board shall be of the opinion that any person . . . has engaged in . . . any such unfair labor practice, the board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including . . . *making employees whole*, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain . . . ." (Emphasis added.)

7. See text accompanying notes 49-89 *infra*.

8. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), *rev'd and remanded sub nom. Auto Workers v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971). (NLRB is without statutory authority to direct make-whole relief for employer's refusal to bargain.)

9. McGuinness, *Is the Award of Damages for Refusals to Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086, 1089 (1968) [hereinafter cited as McGuinness].

10. Under the ALRA, as with the NLRA, the refusal to bargain by the employer, with the expected filing of an unfair labor practice charge by a union, is the only procedure by which an employer can obtain court review of a Board certification of a union. Only after an employer is judged guilty of an unfair labor practice may it then appeal and obtain court review of both the unfair labor practice and the Board's certification decision. Such a course of action is referred to as a "technical" refusal to bargain. See, e.g., *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *A.F. of L. v. Labor Board*, 308 U.S. 401 (1940); *Nishikawa Farms, Inc. v. Mahony*, 66 Cal. App. 3d 781, 136 Cal. Rptr. 233 (1977).

11. *J.R. Norton Co. v. ALRB*, 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979). (California ALRB may not impose make-whole relief in a categorical fashion against an employer found guilty of a "technical" refusal to bargain.)

12. *Id.* at 29, 603 P.2d at 1322, 160 Cal. Rptr. at 726.

a clear and flagrant refusal to bargain designed to stifle employee organization.<sup>13</sup> It is the writer's opinion that the California court has been too limited even in this holding, and should have gone beyond the initial consideration of the "appropriateness" of the make-whole order to an examination of the order's legality in light of NLRB precedent and provisions contained within the ALRA.<sup>14</sup>

An examination by the California Supreme Court beyond its initial consideration is necessary because make-whole relief may presently be imposed by the ALRB in an initial refusal to bargain situation. This imposition occurs when the company and the union have not commenced to bargain, and consequently, have not reached any type of agreement. The award, at this early stage, is calculated by using a standard set forth by the Board<sup>15</sup> which utilizes the terms and conditions of other parties' contracts. In adopting this method of calculation, however, the ALRB has overlooked well-defined NLRB precedent,<sup>16</sup> as well as a specific ALRA provision that the Board lacks power to compel either party to agree to a proposal or require the making of a concession.<sup>17</sup> The imposition of terms and conditions of other parties' contracts, however, *does* compel an employer to agree to proposals which he has had no part in formulating.

This comment will trace the development of the make-whole award in refusal to bargain cases under both the NLRA and the ALRA. It will then contrast the NLRB's position with respect to the award with that taken by the ALRB and the

---

13. *Id.* at 39, 603 P.2d at 1322, 160 Cal. Rptr. at 732.

14. See CAL. LAB. CODE § 1155.2(a) (West Supp. 1981) which provides in part: "[T]o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."

15. Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 24 (April 26, 1978). There, the ALRB examined 37 other agricultural contracts to determine the average negotiated wage rates, and then ordered the employer to make its employees whole for the "net" difference between the basic wage rate in effect at the time of the unfair labor practice, and the average negotiated wage rate of these 37 contracts. See text accompanying notes 84-87 *infra*.

16. Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *rev'd and remanded sub nom.* Auto Workers v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971); Tiidee Prods. Inc., 174 N.L.R.B. 705 (1969), *application for enforcement granted and case remanded sub nom.* IUEW v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970).

17. CAL. LAB. CODE § 1155.2(a) (West Supp. 1981). Section 8(d) of the NLRA contains an identical restriction. 29 U.S.C. § 158(d) (1976).

California Supreme Court. The comment then will examine the legal grounds suggested by various amicus curiae for challenging imposition of the award, before concluding that the restrictions against imposition set forth by the NLRB should apply equally to the ALRB. The ALRB is thus properly bound by these restrictions despite the express grant of authority given the Board to issue the make-whole award.

## II. THE SCOPE OF REMEDIAL POWER UNDER THE ALRA VERSUS THE SCOPE UNDER THE NLRA

### A. *History of the Make-Whole Order Under the ALRA*

Under the ALRA, both the employer and the union have an obligation to bargain collectively with each other in good faith.<sup>18</sup> An employer commits an unfair labor practice when he refuses to bargain collectively in good faith with the union representing the workers that he employs,<sup>19</sup> and the ALRB is empowered "to prevent any person from engaging in any unfair labor practice . . . ."<sup>20</sup>

Many commentators have argued that an employer's refusal to bargain causes serious consequences, specifically, financial injury to the employees and corresponding enrichment of the employer.<sup>21</sup> The consequences flow from the fact that during the delay in bargaining, employee support of the union usually wanes significantly,<sup>22</sup> and injury is imposed upon the employees in the form of delayed or ultimately non-existent contract benefits such as increased wages.<sup>23</sup> The longer the employer breaks the law, the more he is said to

---

18. CAL. LAB. CODE § 1155.2(a) (West Supp. 1981). See also 29 U.S.C. § 160(a) (1976).

19. CAL. LAB. CODE § 1153(e) (West Supp. 1981) provides: "It shall be an unfair labor practice for an agricultural employer . . . (e) to refuse to bargain collectively in good faith with labor organizations . . . ."

20. CAL. LAB. CODE § 1160 (West Supp. 1981).

21. Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059, 1059-60 (1968) [hereinafter cited as Schlossberg & Silard].

22. *IUEW v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir.), cert. denied 400 U.S. 950 (1970). Employee interest in a union can diminish quickly as working conditions remain apparently unaffected by the union or collective bargaining. Thus, when the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. *Id.* Cf. McGuiness, *supra* note 9, at 1101.

23. Schlossberg & Silard, *supra* note 21, at 1064.

profit at the expense of the wronged workers.<sup>24</sup>

The ALRB derives its authority to deal with employer refusals to bargain from section 1160.3 of the ALRA.<sup>25</sup> That section provides the "standard" remedy, also provided for under the NLRA, for the Board to "enter an order requiring such person to cease and desist from such unfair labor practice . . . ."<sup>26</sup> It has been observed in the past, most significantly with respect to the NLRA, that this standard remedy is insufficient to cope with an employer's disregard for the law, and it has been stressed that stronger remedies would be appropriate.<sup>27</sup>

The California Legislature has considered these arguments in favor of stronger remedies. As a result, the legislature provided, for a monetary award to employees for the employer's unlawful refusal to bargain, in addition to the standard cease and desist order found in the NLRA. Section 1160.3 therefore gives the Board authority to take "affirmative action, including . . . *making employees whole*, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain . . . ."<sup>28</sup> The concurrent purposes of this make-whole remedy include compensation of employees for their losses resulting from the employer's refusal to bargain, and encouragement of the practice of collective bargaining by removing the "profit" the employer is said to realize when he refuses to bargain in good faith.<sup>29</sup>

The NLRA, on the other hand, contains no express provision authorizing a money award for an employer's refusal to bargain. The scope of the NLRB's remedial power to award "affirmative relief" has been held to be "merely incidental" to the Board's "primary purpose . . . to stop and prevent unfair labor practices."<sup>30</sup> In this respect, then, while the NLRB has

---

24. *Id.* at 1059.

25. CAL. LAB. CODE § 1160.3 (West Supp. 1981). See note 6 *supra*.

26. *Id.*

27. Yates, *The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experience Under the California Agricultural Labor Relations Act*, 29 LAB. L.J. 666, 667 (1978) [hereinafter cited as Yates].

28. CAL. LAB. CODE § 1160.3 (West Supp. 1981).

29. Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 24 at 9 (April 26, 1978).

30. UAW v. Russell, 356 U.S. 634, 643 (1958). Power to award affirmative relief under section 10(c) is merely incidental to the primary purpose of Congress to stop and prevent unfair labor practices. Congress did not establish a general scheme au-

the power to award make-whole relief in the form of back pay to illegally discharged employees, this power is a limited authority specifically granted to the NLRB.<sup>31</sup>

The United States Supreme Court has further cautioned that the NLRB is not vested with a "virtually unlimited discretion to devise punitive measures, and . . . to prescribe penalties or fines which the Board may think would effectuate the policies of the Act,"<sup>32</sup> the NLRB, instead, must act to dispel the effects of the unfair labor practice it finds,<sup>33</sup> and should make employees whole only for "actual losses."<sup>34</sup>

### *B. When Is Make-Whole Relief Appropriate Under the ALRA?*

#### *1. The ALRB View*

The ALRB's authority to issue a make-whole award for an employer's refusal to bargain is limited in the Code by a restriction ordering it only in those cases "when the board deems such relief appropriate."<sup>35</sup> The California Legislature's enactment of section 1160.3 clearly empowers the ALRB to order make-whole relief, but provides no answer to the important question: under what circumstances is compensatory relief "appropriate"? The rather limited record of the legislative history of the ALRA in general, and of section 1160.3 in particular,<sup>36</sup> indicates that the legislature left the question of "appropriateness" to the ALRB to answer in specific cases,

---

thorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.

31. In back pay cases, the NLRB computes what an employee would have earned had he not been unlawfully denied employment, and subtracts what he actually earned during this period in other employment. The resulting figure is the back pay amount and represents actual loss only. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941).

32. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940). The power to command affirmative action under the NLRA is remedial, not punitive.

33. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961). The power of NLRB to command affirmative action is remedial, not punitive, and is to be exercised in aid of the NLRB's authority to restrain violations which are of a kind that thwart purposes of the statute.

34. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1951). In making workers who have been denied employment whole for losses suffered on account of the unfair labor practice, only actual losses should be made good. Thus, deductions should be made for actual earnings by the worker and for losses which the worker willfully incurred.

35. CAL. LAB. CODE § 1160.3 (West Supp. 1981).

36. *Yates*, *supra* note 27, at 669.

thereby establishing precedent for future cases.<sup>37</sup>

Two cases<sup>38</sup> were brought before the ALRB in 1976 in which the United Farmworkers (UFW) requested make-whole relief for an employer's initial refusal to bargain following a representation election. Testimony in those cases revealed that each employer had committed serious unfair labor practices.<sup>39</sup> The Board was thus presented for the first time with an opportunity to respond to the "appropriateness" of the remedy. It held that make-whole relief should be employed "whenever an employer has been found to bargain in violation of section 1153(e) and (a), the good faith bargaining provisions of the Act, and the employees have suffered losses of pay as a result."<sup>40</sup> The Board justified this broad interpretation of the Act's wording, authorizing the issuance of a make-whole order for *any* refusal to bargain, by arguing that a refusal to bargain struck "at the very heart of the system of labor-management relations which the Legislature sought to create . . . ."<sup>41</sup> "Regardless of the employer's motivation, bad faith bargaining necessarily harms employees financially, weakens their union and confers a competitive advantage upon the employer for violating the law."<sup>42</sup> The Board's argument reflects the position taken by many commentators that the standard cease and desist order is inadequate. It therefore laid down a "blanket" rule requiring the imposition of make-whole relief against an employer in *any* refusal to bargain case.

The rule established in these two cases was followed one year later in *J.R. Norton*.<sup>43</sup> In that case, make-whole relief was imposed upon an employer found guilty of an unfair labor practice because he refused to bargain in order to obtain judi-

---

37. *Id.*

38. Perry Farms, Inc., 4 A.L.R.B. No. 25 (March 10, 1977); Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 24 (April 26, 1978).

39. In *Perry Farms*, the employer "had steadfastly refused to recognize the UFW as the legitimate union; had harassed, intimidated and physically abused a union organizer; and, after the union had won a representation election and been duly certified by the board, had refused to bargain or even to meet with the union or supply it with requested information." Yates, *supra* note 27, at 670. The employer in *Adam Dairy* "had engaged in a campaign of harrassment: firing, demoting, and transferring known union supporters before the election, and after union certification, continuing such practices while engaging half-heartedly in collective bargaining." *Id.*

40. Perry Farms, Inc., 4 A.L.R.B. No. 25 at 9 (March 10, 1977).

41. *Id.* at 10.

42. Yates, *supra* note 27, at 674.

43. *J.R. Norton*, 3 A.L.R.B. No. 66 (May 23, 1977).



cial review of a representation election. Due to the "blanket" rule, an employer's action was made to fall within the scope of the rule whenever he committed a technical refusal to bargain in order to challenge the propriety of an election before the courts, and such challenge was subsequently rejected.<sup>44</sup>

2. *The California Supreme Court's View*

The California Supreme Court reversed the Board in *J.R. Norton Co. v. ALRB*<sup>45</sup> and held that the Board lacks authority to impose make-whole relief in a categorical fashion when the employer has been found guilty of an unfair labor practice resulting solely from a technical refusal to bargain. The court observed that two competing considerations, both of which are fundamental to ALRA policy, arise whenever a representation election is attacked. The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. When used to that end, the court agreed that make-whole relief is appropriate.<sup>46</sup> The second consideration, however, is the important interest in fostering judicial review as a check on arbitrary administrative action. This involves cases in which the employer has raised a meritorious objection to an election and the objection has been rejected by the Board.<sup>47</sup> It is in serving this interest that a rule automatically imposing make-whole relief cannot be sustained. As the court observed, "such a rule places burdensome restraints on those who legitimately seek judicial resolution of close cases in which a potentially meritorious claim could be made that the NLRB or ALRB abused its discretion."<sup>48</sup> In the court's opinion, the Board failed to acknowledge the serious deterrent impact on judicial review when it announced the rule and when it applied it to this case. Blanket imposition, stressed the court, unduly emphasizes compensation by ignoring the pursuit of legitimate objections to election misconduct.<sup>49</sup>

The California Supreme Court thus has established the standard which the ALRB must follow when it awards make-

---

44. *J.R. Norton Co. v. ALRB*, 26 Cal. 3d 1, 28, 603 P.2d 1306, 1321, 160 Cal. Rptr. 710, 725 (1979). See text accompanying note 10 *supra*.

45. 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979).

46. *Id.* at 30-31, 603 P.2d at 1323, 160 Cal. Rptr. at 726-27.

47. *Id.* at 30, 603 P.2d at 1322, 160 Cal. Rptr. at 726.

48. *Id.* at 32, 603 P.2d at 1324, 160 Cal. Rptr. at 728.

49. *Id.* at 34, 603 P.2d at 1325-26, 160 Cal. Rptr. at 729.

whole relief in refusal to bargain cases. The Board may not "deem such relief appropriate" in *any* case of an employer's refusal to bargain. Instead, make-whole relief is "appropriate" only where an employer, claiming merely to challenge the validity of election results, refuses to bargain as a dilatory tactic intended to stifle employees' organization.<sup>50</sup>

### C. *History of the Make-Whole Order Under the NLRA*

The ALRB's power under section 1160 of the ALRA "to prevent any person from engaging in any unfair labor practice"<sup>51</sup> is identical to that of the NLRB under section 10(a) of the NLRA.<sup>52</sup> Likewise, the NLRB has the specific power to remedy unfair labor practices and is required by section 10(c) to issue an order "requiring such person to cease and desist from such unfair labor practice and to take affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this [Act]."<sup>53</sup> Unlike section 1160.3 of the ALRA, however, section 10(c) contains no express provision for make-whole relief.

An employer violates section 8(a)(5) of the NLRA when he improperly refuses to bargain with a union. Unions, therefore, have often requested a make-whole order to reimburse the effected employees for any benefits they would have obtained if the employer had not refused to bargain and a contract had been executed. In the late 1960's, the NLRB considered these requests and granted oral argument "on the possibility and propriety of its adopting additional or new methods to remedy unlawful refusals to bargain in violation of section 8(a)(5)."<sup>54</sup> Specifically, the NLRB looked at "whether [it had] the authority to order an employer to reimburse his employees for the loss of wages and fringe benefits that they

---

50. *Id.* at 39, 603 P.2d at 1328-29, 160 Cal. Rptr. at 732. The limited legislative history that does exist on the ALRA also supports the conclusion reached by the court that the Act did not intend make-whole relief to be applied on an across-the-board basis. In the hearings before the Senate committee reviewing the bill, then-Secretary of Agriculture and Services (now Chief Justice) Rose Elizabeth Bird "testified that the provision authorizes the Board to award make-whole damages only when the Board has determined that an employer refused to bargain and acted in bad faith." *Id.* at 38, 603 P.2d at 1328, 160 Cal. Rptr. at 731.

51. CAL. LAB. CODE § 1160 (West Supp. 1981).

52. 29 U.S.C. § 160(a) (1976).

53. *Id.* § 160(c).

54. McGuinness, *supra* note 9, at 1086.

would have obtained through collective bargaining if the employer had not refused to bargain in good faith."<sup>55</sup>

The NLRB considered whether or not it had the authority to award make-whole relief in *Ex-Cell-O Corp.*<sup>56</sup> In that case, the union had won an NLRB election and was certified as the employees' bargaining representative. The employer advised the union that it would refuse to bargain and would seek appellate court review of the NLRB's union certification. The union filed an unlawful refusal to bargain charge and also requested a make-whole order based on the employer's refusal to bargain. The trial examiner recommended that the employer be ordered to pay monetary damages for its refusal to bargain, but the NLRB refused to approve the recommended order and stated that it did not have the statutory power to order the make-whole remedy.<sup>57</sup>

The NLRB decision in *Ex-Cell-O* clearly rejected the position granting make-whole relief taken earlier by the Court of Appeals, District of Columbia Circuit, in *Tiidee Products*.<sup>58</sup> The appellate court had previously formulated the first judicial test for determining the appropriateness of make-whole relief for an employer's unfair labor practice: if the litigation raised "patently frivolous objections," make-whole relief would be an appropriate remedy.<sup>59</sup> Yet, the NLRB refused to apply the remedy even in a "*Tiidee* situation," stating that it could not

agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is 'debatable' while that of another is 'frivolous.' What is debatable to the Board may appear frivolous to a court, and vice versa. Thus, the debatability of the employer's position in an 8(a)(5) case would itself become a matter of intense litigation.<sup>60</sup>

---

55. *Id.* at 1086-87 (footnote omitted).

56. 185 N.L.R.B. 107 (1970), *rev'd and remanded sub nom.* *Auto Workers v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971).

57. *Id.* at 108-11.

58. 426 F.2d 1243, 1248-53 (1970).

59. *Id.* at 1248. In *Tiidee*, the company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous and violated the express terms of the agreement for a consent election entered into with the union.

60. 185 N.L.R.B. 107, 109 (1970) (footnote omitted).

The NLRB has not disagreed with the court of appeals' recognition of the need for a remedy that will "advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation"<sup>61</sup> in refusal to bargain cases. Yet, the NLRB has not agreed with the court as to what that remedy is. As evidenced in *Tiidee*, courts have accepted union proposals for a make-whole remedy in certain situations. However, the NLRB has refused to grant make-whole relief under any circumstances.

### III. LEGAL GROUNDS FOR CHALLENGING IMPOSITION OF MAKE-WHOLE RELIEF

The NLRB's arguments for refusing to impose make-whole relief for an employer's refusal to bargain apply as well to imposition of the award under the ALRA. The NLRB stated its two principal objections to the make-whole award in *Ex-Cell-O*. Briefly, the NLRB contended that a compensatory remedy such as make-whole relief would be speculative, and would require it to guess the terms of a future contract as well as to assume that the agreement would be favorable to the employees.<sup>62</sup> Further, the remedy requires the NLRB to dictate the terms of the ultimate bargain, which the United States Supreme Court has ruled it cannot do.<sup>63</sup> Both of these objections, it will be seen, are valid in the context of the calculation and application of the make-whole award by the ALRB. While recognizing that the ALRB is required to follow NLRB precedent, it also must adhere to the numerous decisions of the Supreme Court, courts of appeals, and the NLRB interpreting the NLRA. Consequently, the ALRB should be as reluctant to award make-whole relief as the NLRB is, despite the express grant of authority given to the ALRB to issue such an award.

The award, as applied by the ALRB, can be attacked on

---

61. Comment, *Status of the Make-Whole Remedy in Refusal-to-Bargain Cases*, 2 FLA. ST. L. REV. 153, 154 (1974)(quoting 426 F.2d 1243, 1251 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970)).

62. Yates, *supra* note 27, at 66 (citing McDowell and Huhn, *NLRB Remedies for Unfair Labor Practices*, Labor Relations and Public Policy Series, Report No. 12 at 231 (1976) [hereinafter cited as McDowell and Huhn]).

63. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). Parties' freedom of contract is not absolute under NLRA, but NLRB may not compel agreement merely because parties themselves cannot agree.

the additional ground that it interferes with union-employer negotiation of contract terms which take place during *post-award* bargaining. This argument will also be discussed below.

### A. *Speculative Nature of the Award*

Under common law principles of damages for private injury, a claimant is required to prove by a preponderance of the evidence that he has sustained an injury.<sup>64</sup> The claimant will be denied recovery if he cannot produce a reasonable basis from which damages can be computed, since otherwise, the award would be conjectural and therefore penal.<sup>65</sup>

The NLRB has observed these common law principles in fashioning monetary awards. It has ordered monetary relief for an injury resulting from a public wrong pursuant to the NLRA only when the amount of the injury could reasonably be calculated.<sup>66</sup>

Both the fact and extent of damage are difficult to ascertain in refusal to bargain cases. Nevertheless, to sustain an order imposing make-whole relief, the union should first prove that a contract would have been negotiated if the employer had not refused to bargain. Additionally, it should prove, by computation with reasonable accuracy, the value of the benefits that would have accrued under the contract.<sup>67</sup>

#### 1. *Proof that a contract would have been executed.*

To show that a contract would have been negotiated if bargaining had occurred is not a simple task, even though under the NLRA, contracts are negotiated in first bargaining situations in approximately 85 percent of the cases where an employer does not refuse to bargain.<sup>68</sup> "Since employers who

---

64. Comment, *Employee Reimbursement for an Employer's Refusal to Bargain: The Ex-Cell-O Doctrine*, 46 TEX. L. REV. 758, 763 (1968) [hereinafter cited as Texas Comment]; see, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *F.W. Woolworth Co. v. NLRB*, 121 F.2d 658, 663 (2d Cir. 1941).

65. Texas Comment, *supra* note 64, at 763; see, e.g., *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*, 269 F. Supp. 605, 614 (S.D. Fla. 1966), *aff'd per curiam*, 381 F.2d 735 (5th Cir. 1967).

66. See, e.g., *Herman Sausage Co.*, 122 N.L.R.B. 168, 172-73 (1958), *enforced*, 275 F.2d 229 (5th Cir. 1960); *F.W. Woolworth Co. v. NLRB*, 121 F.2d 658, 663 (2d Cir. 1941).

67. Texas Comment, *supra* note 64, at 764.

68. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 115 n.48 (1970). See generally Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 LAB. REL. YEARBOOK 299, 306.

violate the Act are usually more opposed to unionism and the collective-bargaining principle than employers who do not violate the Act, an employer who unlawfully refuses to bargain will be less likely to execute a contract with the union than an employer who does not refuse to bargain."<sup>69</sup> This makes it even more difficult for the union to prove that a contract would have been executed.

The purpose of the make-whole remedy is to compensate employees for the "lost *opportunity to negotiate* a contract," not to compensate them for a lost contract.<sup>70</sup> Since the injury is established by proof that the employer refused to bargain, the amount of the recovery need only be reasonably calculable. Admittedly, the argument is weak because the probability that a contract would have been negotiated determines the value of the union's opportunity to bargain with the employer.<sup>71</sup> "Establishing this probability with reasonable accuracy is as difficult as proving that a contract actually would have been negotiated."<sup>72</sup>

## 2. *Proof of the amount of the award*

Calculating the benefits that employees would have received had their employer bargained in good faith is also very difficult. In making this calculation, the Board must speculate on the maximum amount the employer is prepared to give and the minimum amount the union is willing to take.<sup>73</sup>

Three criteria for calculating the award were proposed in the *Ex-Cell-O* case: "(1) the average collective-bargaining increments negotiated by all unions in either manufacturing or nonmanufacturing establishments compiled by the Bureau of Labor Statistics; (2) the average benefits obtained by the complaining union in other contracts it has negotiated; and, (3) the benefits enjoyed under union contracts at the employer's other plants."<sup>74</sup> The second criterion represents the closest approximation to the method of calculation adopted by the ALRB for the make-whole remedy.

The California Supreme Court did not consider the calculation and application of the actual award in *Norton*; there-

---

69. Texas Comment, *supra* note 64, at 764.

70. *Id.*

71. *Id.*

72. *Id.*

73. McDowell and Huhn, *supra* note 62, at 231.

74. Texas Comment, *supra* note 64, at 767.

fore, the method adopted by the ALRB in *Adam Dairy*<sup>75</sup> remains the standard by which the award is calculated in California. The Board, in that case, had sought a formula for fashioning the actual remedy which was reasonably accurate, but simple, general, and nonspeculative enough to avoid lengthy compliance hearings and further litigation.<sup>76</sup> "As a practical matter, the task before the Board in *Adam Dairy* was to further the concurrent purposes of compensation and collective bargaining without intertwining itself in the details of bargaining to the point where 'the dictates of the State are substituted for agreement of the parties.'"<sup>77</sup>

The ALRB first decided that the remedy, irrespective of the method of its ultimate calculation, should be calculated to run from the first refusal to bargain in good faith,<sup>78</sup> and that the award would be calculated at the time of the Board's decision on the unfair labor practice charges, rather than at a post-hearing compliance proceeding.<sup>79</sup>

In deciding upon the method for computing the award, the Board rejected the union's recommendation that each particular provision of a hypothetical contract and its alternatives should be considered separately<sup>80</sup>—a so-called "costing-out" approach. Recognizing that such an approach "requires far too much time to be spent in gathering information and making calculations, and contains too much potential for dispute over detailed components of the award,"<sup>81</sup> the Board instead adopted a more generalized formula, patterned after the calculation set forth in proposed amendments to the NLRA as part of the Labor Reform Act of 1977.<sup>82</sup>

The ALRB, in calculating the *Adam Dairy* make-whole award, examined thirty-seven other agricultural contracts to determine the average negotiated wage rates, before ordering the employer to make its employees whole for the "net" difference between the basic wage rate in effect at the time of

---

75. *Adam Dairy dba Rancho Dos Rios*, 4 A.L.R.B. No. 24 (April 26, 1978).

76. *Yates*, *supra* note 27, at 674.

77. Comment, *Make-Whole Under the ALRA: Its Applicability and Scope*, 13 U.S.F. L. Rev. 971, 999 (1978-79)(quoting *Adam Dairy dba Rancho Dos Rios*, 4 A.L.R.B. No. 24 at 9 (April 26, 1978) [hereinafter cited as U.S.F. Comment].

78. *Yates*, *supra* note 27, at 675.

79. U.S.F. Comment, *supra* note 77, at 999.

80. *Id.* at 1000. See also *Yates*, *supra* note 27, at 674.

81. *Adam Dairy dba Rancho Dos Rios*, 4 A.L.R.B. No. 24 at 13 (April 26, 1978).

82. H.R. REP. No. 8410, 95th Cong., 2d Sess. (1978).

the unfair labor practice and the average negotiated wage rate of the thirty-seven other contracts.<sup>83</sup> The Board determined that the term "pay" in section 1160.3 also included fringe benefits, and these were incorporated in the remedy as well.<sup>84</sup> Lastly, the Board looked to U.S. Department of Labor materials<sup>85</sup> relating to the percentages of total compensation represented by basic wages and fringe benefits, and determined that twenty-two percent of the total compensation represented fringe benefits, and the remaining seventy-eight percent represented basic straight-time wages.<sup>86</sup>

The ALRB's method of computation was specifically proposed in *Ex-Cell-O* and was criticized by the NLRB as being "too speculative because the statistics utilized will be related only indirectly to the parties involved in the particular proceedings and therefore will not reflect the attributes of the particular employer and union involved, which are the critical factors that determine what concessions the employer would have made."<sup>87</sup> This criticism has not lost its validity in the context of the calculation of make-whole relief under the ALRA. The ALRB's method of computation is no less speculative than it was recognized to be in *Ex-Cell-O*, and for this reason, it should have been rejected by the ALRB.

### *B. The Board's Remedy Intrudes into the Collective Bargaining Process*

One strong argument against imposition of the make-whole remedy, which parallels the argument that the make-whole remedy is impermissibly speculative, is that the Board, by assuming that a contract would have been reached, and then determining what the essential terms of the agreement would have been, is in effect, making a contract for the parties.<sup>88</sup> Such action clearly contradicts the policies of both the NLRA and the ALRA.<sup>89</sup>

---

83. Comment, *The Make-Whole Remedy: California's ALRB Deals with Refusals to Bargain*, 19 SANTA CLARA L. REV. 1093, 1105 (1979).

84. Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 24 at 7 (April 26, 1978).

85. *Id.* (citing 1977 U.S. Dept. of Labor, Bureau of Labor Statistics, *Employee Compensation in the Private Nonfarm Economy* (1974)). The ALRB took the data for nonmanufacturing employees as the best proxy for agricultural laborers.

86. U.S.F. Comment, *supra* note 77, at 1001; Yates, *supra* note 27, at 675.

87. Texas Comment, *supra* note 64, at 767.

88. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970).

89. CAL. LAB. CODE § 1155.2(a) (West Supp. 1981), 29 U.S.C. § 158(d) (1976)



The national labor policy precludes government intervention into the substantive terms and conditions of collective bargaining. "[T]he duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."<sup>90</sup> The Supreme Court affirmed this basic policy in its first interpretation of the NLRA when it stated, "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."<sup>91</sup>

Section 8(d) of the NLRA and section 1155.2(a) of the ALRA contain identical provisions that the Act "does not compel either party to agree to a proposal or require the making of a concession."<sup>92</sup> The Supreme Court in *H.K. Porter Co.*<sup>93</sup> held that although the NLRB had the power to require employers to negotiate, it was without power, under section 8(d) of the NLRA to compel a company or union to agree to any substantive contractual provision of a collective bargaining agreement.<sup>94</sup>

The NLRB confronted the *Porter* holding in *Ex-Cell-O* when it said:

The [make-whole] remedy . . . operates retroactively to impose financial liability upon an employer flowing from a presumed contractual agreement . . . . [T]he employer has not agreed to the contractual provision for which he must accept full responsibility as though he had agreed to it. [T]here is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from the bargaining . . . . The employer . . . is forced to accede to terms never mutually established by the parties.

Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take?

---

and § 8(d) of the NLRA provide that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

90. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935).

91. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). NLRA does not compel agreements between employers and employees or any agreement whatever, but proceeds on theory that free opportunity for negotiation is likely to promote industrial peace and bring about adjustments and agreements, which the act itself does not attempt to compel.

92. 29 U.S.C. § 158(d) (1976); CAL. LAB. CODE § 1155.2(a) (West Supp. 1981).

93. 397 U.S. 99 (1970).

94. *Id.* at 102.

Who is to say that a favorable contract, would, in any event, result from the negotiations? To answer these questions, the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.<sup>95</sup>

The ALRA provision prohibiting the ALRB from compelling agreement is identical to that contained in the NLRA. More importantly, as earlier stated, the ALRB is required to follow applicable NLRB precedent.<sup>96</sup> For these reasons, then, the Supreme Court holding in *H.K. Porter* restricts ALRB interference in the collective bargaining process as it does against the NLRB. Similarly, the constitutional premise to the Supreme Court's holding in *NLRB v. American National Insurance Co.*<sup>97</sup> that the NLRB "may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of a collective bargaining agreement" is thereby equally applicable to the ALRB.<sup>98</sup>

In fashioning its make-whole remedy, the ALRB has ignored this NLRB precedent and the express direction to follow it. The NLRB stressed in *Ex-Cell-O* that "there is no basis for the remedy unless the Board finds, as a matter of fact, that a contract would have resulted from the bargaining."<sup>99</sup> As it was calculated in *Adam Dairy*, however, the remedy was forced upon an employer in terms determined by the Board, and the employer was provided with no opportunity to assent to or reject the terms. Clearly, California's legislative intent is not to impose a contract on the employer, but through the application of the make-whole award, the ALRB can impose a contract on the employer indirectly, under the guise of an "equitable remedy,"<sup>100</sup> even though it is without direct power to do so. Indeed, section 1155.2(a) forbids it to do so. Taken together with applicable NLRB precedent, then, it follows that unless it first finds that there would have been a contract

---

95. 185 N.L.R.B. 107, 108-10 (1970).

96. CAL. LAB. CODE § 1148 (West Supp. 1981).

97. 343 U.S. 395 (1952).

98. *Id.* at 404. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312-18 (1965); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 497-98 (1960).

99. 185 N.L.R.B. 107, 110 (1970).

100. *Hearings on Sen. Bill No. 1 Before Senate Industrial Relations Comm.*, Third Ex. Sess. (1975) (statement of Rose Elizabeth Bird).

but for the employer's failure to bargain, the ALRB has no basis to impose the make-whole award.

The ALRB presumes<sup>101</sup> that losses of pay have been suffered in every case in which it is found that an employer has improperly refused to bargain. Yet, agreement is not always reached between employers and certified unions even when bargaining is conducted in good faith.<sup>102</sup> It should therefore not be assumed in every refusal to bargain case that had the employer initiated bargaining earlier, agreement would have been reached upon a binding contract, much less that this presumed agreement would have brought increased wages and other benefits to employees. The ALRB does not possess some second sight which enables it to "find" that which the NLRB has specifically held cannot be found—namely, that a contract would have been reached, but for the employer's failure to bargain.

### C. *The Award Creates Expectations in the Union and the Employees*

In addition to the basic objection that the award indirectly forces substantive contract provisions on an employer, the ALRB's application of the award arguably interferes with union-employer negotiation over contract terms which will take place during *post-award* bargaining because it creates expectations in the union and the employees.<sup>103</sup>

When the employer and the union begin to negotiate the terms of the future contract, the union will base its bargaining position on terms which the Board has awarded in its make-whole remedy; the union inevitably will want to regard the make-whole award as the "floor" in bargaining with the employer. This argument is persuasive once it is realized that no union can afford to return from the bargaining table with a contract containing less favorable terms than the terms set by the Board in its make-whole remedy and expect, at the same time, to maintain the support of a majority of the employees. Consequently, the application of ALRB's make-whole relief

---

101. Perry Farms, Inc., 4 A.L.R.B. No. 25 at 9 (March 10, 1977).

102. See text accompanying note 68 *supra*. See generally Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 LAB. REL. Y.B. 299, 306.

103. *Amicus curiae* Brief in Support of Petitioner, J.R. Norton Co., Inc. v. ALRB, L.A. No. 31026 at 63-64 (ALRB No. 77-CE-166-E; 4 ALRB 39) (June 22, 1978).

results in the imposition of contract terms upon an employer for the period of the make-whole remedy, as well as the creation of a baseline for all future bargaining. The employer is thus placed at a substantial disadvantage when the parties ultimately begin to bargain.<sup>104</sup>

By far, the strongest argument against the ALRB's calculation and application of the make-whole award is that the remedy, as applied, impermissibly intrudes into the bargaining process. The NLRB has stressed this point consistently in refusing to grant the award. It is true that the NLRA contains no express provision for make-whole relief, so the NLRB's contention that it lacks statutory authority to issue such an award does not apply to the ALRB. However, at least one federal court of appeals case<sup>105</sup> has held that the NLRB possesses the authority to issue the remedy, and yet the NLRB has repeatedly refused to do so. The NLRB's argument, therefore, should be viewed as extending beyond its basic contention that it is without statutory power to issue the award, and should be based more correctly upon the restriction set forth in section 8(d), and construed by the Supreme Court, that the NLRB may not compel agreement between the parties. When this restriction prohibiting Board interference in the bargaining process is correctly viewed as the real basis for the NLRB's refusal to issue make-whole relief, it becomes clear that the ALRB should also refuse to issue the award in those situations where doing so would intrude into the parties' bargaining. It seems reasonable to conclude that the ALRB should not issue the award in the absence of some type of prior agreement between the particular parties upon which the award can be based.

---

104. *Id.*

105. The District of Columbia Circuit has disagreed with the NLRB's holding in *Ex-Cell-O* and has held in a number of cases that the NLRB possesses the statutory authority to grant the make-whole remedy. See *Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO (Levi Strauss) v. NLRB*, 441 F.2d 1027 (D.C. Cir. 1970); *United Steel Workers of America, AFL-CIO v. NLRB (Quality Rubber Co.)*, 430 F.2d 519, 521-22 (D.C. Cir. 1970); *Int'l Union of Electrical Radio and Machine Workers v. NLRB (Tiidee Products, Inc.)*, 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970). Other circuits have considered the make-whole remedy but have avoided ruling on the NLRB's statutory authority. See, e.g., *Steelworkers (Metco, Inc.) v. NLRB*, 496 F.2d 1342 (5th Cir. 1974); *Bartenders Local 703 (Restaurant and Tavern Ass'n) v. NLRB*, 488 F.2d 644 (9th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); *Lipman Motors, Inc. v. NLRB*, 451 F.2d 823, 829 (2d Cir. 1971).

In short, assuming that the Legislature did not intend to enact two inconsistent provisions within the ALRA, the express authority granted the ALRB by section 1160.3 of the ALRA to issue the make-whole award must be viewed as restricted by section 1155.2(a). The Board, of course, has the *legal* authority to issue the award, but the award, as applied, may be illegal if the restriction contained in section 1155.2(a) is ignored. The California Supreme Court did not consider the possible illegality of the award when it held simply that the award is "appropriate" whenever an employer commits a clear and flagrant refusal to bargain designed to stifle employee organization. For the preceding reasons, the court should have gone further and held that, in addition to the aforementioned standard, the award is "appropriate" only when it can be issued without contravention of the restriction set forth in section 1155.2(a).

#### IV. ALTERNATIVES TO THE ALRB'S CALCULATION AND APPLICATION OF THE MAKE-WHOLE AWARD

Several possible alternative methods exist by which the ALRB could award make-whole relief so as to avoid the taint of illegality discussed above. One such alternative is that the ALRB could receive and consider evidence as to the relative economic strengths of the parties before it, thereby affording the Board some evidentiary basis for concluding whether or not a contract would have been agreed upon and what its terms and conditions would have been.<sup>106</sup> It seems unlikely that the Board would choose such an approach, however, considering the ALRB's desire to avoid taking "too much time . . . [in] dispute over detailed components of the award."<sup>107</sup> This approach, however, is preferable to the Board's current one, and it should be considered even if it would mean an increase in Board involvement in the calculation of the award.

A second possible approach, and one which would not ignore the restriction in section 1155.2(a), is for the Board to direct a conditional remedy to be effectuated only if and when

---

106. *Amicus curiae* Brief on behalf of Nisei Farmers League and San Joaquin Nisei Farmers League in Support of Petitioner, J.R. Norton Co. v. ALRB, L.A. No. 31027 at 45. (June 22, 1978).

107. Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 24 at 13 (April 26, 1978).

the parties actually negotiate a binding agreement through the free process of collective bargaining.<sup>108</sup> The Board, if it chose this approach, would direct that should the parties ultimately agree upon a contract, the contract terms would be retroactive. In this way, the make-whole award would compensate employees for their *actual losses*, by utilizing only those terms that the parties themselves had negotiated and agreed upon. This approach has a serious flaw, however, since it provides the employer with absolutely no incentive to reach an agreement with the union, and therefore would be contrary to the Act's basic policy of encouraging collective bargaining.<sup>109</sup>

The most sensible and equitable approach that the Board could take and still retain the power to issue the award is simply to narrow the "appropriateness of relief" standard beyond that which was set forth by the California Supreme Court. The award should be "appropriate", as the court held, only in cases of clear and flagrant refusals to bargain, *and* only where the award can be based on terms and conditions of an agreement previously reached between the parties. Because there must necessarily have been a prior agreement between the parties, it appears that make-whole relief would not be appropriate in the context of an initial refusal to bargain. In these cases, the ALRB would simply have to adopt the position taken by the NLRB and look to the standard cease and desist order to remedy the employer's unfair labor practice.

It is important to note that two bills have been introduced in the California Legislature which would effectively repeal the ALRA and replace it with the NLRA. Assembly Bill 34 (A.B. 34), introduced December 1, 1980, at the urging of various labor interests, attorneys and farmer organizations, provides that identical rules would govern *all* labor unions, including farm labor unions. Senate Bill 50 (S.B. 50) is identical to A.B. 34 and was introduced as a backup measure to provide an alternate vehicle in the event A.B. 34 failed to move.

---

108. *Amicus curiae* Brief on behalf of Nisei Farmers League and San Joaquin Nisei Farmers League in Support of Petitioner, J.R. Norton Co. v. ALRB, L.A. No. 31027 at 45 (June 22, 1978).

109. The declared policy of both the ALRA and the NLRA is to promote peaceful settlement of disputes by encouraging collective bargaining and by protecting employee rights. 29 U.S.C. § 151 (1976); CAL. LAB. CODE § 1140.2 (West Supp. 1981).

The authors<sup>110</sup> of both bills appear guardedly optimistic at this time with respect to passage of the bills in both houses of the Legislature. However, due to the intense controversy associated with the bills, a lengthy battle appears likely. The measures undoubtedly will be vigorously opposed by the United Farmworkers and it is not certain whether the Governor would sign either bill into law even after passage in the Legislature.

Obviously, the passage of either bill would eliminate the present controversy surrounding the ALRB's application of the make-whole remedy. It may not, however, be necessary to do away with the make-whole provision in its entirety in order to avoid the problems that arise when it is applied in a refusal to bargain case. As discussed earlier, if the ALRB initiated the restriction of the application of the award to only those cases in which the terms and conditions of other parties' contracts need not be relied upon, the remedy could effectively carry out the basic policy of the Act to encourage collective bargaining, and at the same time, would not offend the Act's equally important policy of maintaining freedom of contract between the parties.

## V. CONCLUSION

Unless the ALRB narrows its standard beyond that adopted by the California Supreme Court in *Norton* and applies make-whole relief to only those cases in which the Board need not rely on the terms and conditions of other parties' contracts, make-whole relief, though a legal remedy, will be illegal as applied.

This comment stresses the need for the ALRB to reconsider its calculation and application of the award in light of section 1155.2(a) of the ALRA, which prohibits the Board from intruding into the collective bargaining process, beyond the consideration which it has professed already to have made.<sup>111</sup> A serious reexamination of NLRB precedent in this area is also warranted, and it is crucial that the Board not lose sight of the fact that it is bound in its actions by this federal

---

110. William A. Craven, Senator, Thirty-eighth District; Richard Lehman, Assemblyman, Thirty-first District.

111. Adam Dairy dba Rancho Dos Rios, 4 A.L.R.B. No. 25 at 10-11 (April 26, 1978).

precedent.

The problems announced by the NLRB in its so-called "Ex-Cell-O Doctrine" remain just as evident under the ALRA and cannot be ignored by the ALRB. The most serious problem under both Acts is that make-whole relief cannot be imposed upon an employer if the award itself impermissibly involves either the NLRB or the ALRB in the bargaining process. The ALRB has been given the authority to grant make-whole relief, but such authority cannot be exercised at the expense of other provisions contained within the ALRA. It is the writer's opinion that in calculating and applying the award in its present form, the Board *has* exercised its authority at the expense of other ALRA provisions, namely the provision which prohibits the Board from compelling agreement between the parties, and the provision directing the Board to follow applicable NLRB precedent.

The proposed legislation in this area should not be necessary in order to eliminate the problems inherent in the application of the make-whole remedy, provided that the ALRB correctly interprets the present law. The introduction of A.B. 34 and S.B. 50 is important, however, as a warning to the ALRB that it must interpret the Act so that *all* provisions are given effect. The mere authority to grant make-whole relief given to the ALRB does not allow it to disregard certain provisions of the Act in favor of others or to ignore the well-established and well-reasoned NLRB precedent in this area.

*Mary Lynne Thaxter*



